



United States
Department of
Agriculture

Food and
Nutrition
Service

Mountain
Plains
Region

1244 Speer Boulevard
Denver, CO 80204-3585

Reply to
Attn. of: SP 00-6

JAN 12 2000

Subject: Contracting Standards

To: STATE AGENCY DIRECTORS - Colorado ED, Colorado HS, Iowa,
Kansas, Missouri ED, Montana OPI,
Nebraska ED, Nebraska SS, North
Dakota, South Dakota, Utah, and
Wyoming ED

Over the past year a number of questions have been raised relating to the Federal procurement standards. This memorandum is to clarify and amplify the National Office's expectation's when Federal moneys will be used in whole, or in part to purchase supplies, food, equipment and other services. In accordance with CFR Part 210.21, this communication applies equally to procurement actions of the State agency (SA) or the local level procurement actions of the school food authority (SFA).

The cornerstone of any procurement action is that it must be conducted with maximum open and free competition and be in accordance with Federal and State procurement requirements. This means if the acquisition will exceed \$10,000 in aggregate (or less if the State or local small purchase threshold is below \$10,000), the SA or SFA must use a formal procurement method. For goods (particularly nonperishable food products, supplies and equipment), the appropriate method is usually sealed bids which must result in a fixed price contract. Certain products, including perishables such as fluid milk, other dairy products and fresh produce, as well as custom made equipment, are more appropriately purchased using competitive negotiation, which allows for fixed priced or cost-plus-fixed-fee contracts.

Under fixed price contracting, the prices are fixed for the duration of the contract, which is usually one year. However, under cost-plus-fixed-fee contracts, the SA or SFA may have a

different contracting pattern and often use semi-annual bids or 6 month contracts that are in conformance with historical practices. Officials also have the flexibility to formally bid items having a value less than \$10,000, but are not permitted to subdivide procurement actions in order to bypass formal bidding procedures. At the same time, officials still have a great deal of latitude in defining what constitutes "in the aggregate on an annual basis." Documenting whether formal or informal procurement procedures should be used is a logical thought process and does not need to be a complicated. The following questions should be asked and the responses fully documented:

- How does the organization normally handle Program procurement?
- Are procurement actions normally centralized or delegated to a specific person or organization?
- How are contracts normally bid: single items, group of items, or all or nothing?
- Is the proposed action reasonable and necessary or designed to circumvent normal procedures?

The next step in the process is ensuring that the Request for Proposal (RFP) or Invitation to Bid (ITB) indicates that the resulting contract must comply with all Federal standards of the Office of Management and Budget (OMB) Circular A-102, Attachment O as referenced in Item 14, Contract Provision, pages 10-12 and are attached to assist you. Parenthetically, officials should also ensure the respective Child Nutrition Program regulatory requirements are met.

The RFP must state that a condition for bidding for the contract is compliance with the Debarment, Suspension, Ineligibility and Voluntary Exclusion requirements of CFR Part 3017. All firms wishing to submit a bid must also submit a certification regarding debarment/suspension from participating in Federal contracts. A new certification is required for each renewal period.

The RFP must also state that an additional condition for bidding is providing a Certification Regarding Lobbying in accordance with CFR Part 3018. A new certification is also required for each renewal period. Lobbying activities in connection with the Child Nutrition Programs must be identified and activities must be reported on the Disclosure of Lobbying Activities form each

quarter. If there are material changes after the initial filing, updated reports must be submitted.

The underlying purpose of the Federal procurement process is to assure that to the maximum extent possible there is open and free competition for ensuring the best quality for the best price, all things being considered. It is, therefore, necessary to solicit an adequate number of qualified sources to ensure the effective operation of competitive forces. Since the Federal rules do not define "adequate", it is essential for an organization to protect itself from charges of impropriety by planning for competition:

- Mailing the RFP to known suppliers.
- Publishing notices of the procurement in appropriate media such as newspapers of general circulation, trade journals, etc.

An organization which demonstrates it has followed the foregoing steps to maximize competition will have little difficulty justifying noncompetitive negotiation. Federal procurement rules outline four situations in which noncompetitive negotiation is permitted:

- The item is available from only one source. This means that after soliciting a number of sources, the item is literally only available from one source, not that the organization has decided that only one vendor's product will meet its needs.
- The Federal agency approves the use of noncompetitive negotiation. The Chief Financial Officer of USDA may approve the use of noncompetitive negotiation when the organization can demonstrate that the item is only available from one source.
- There is insufficient competition. Inadequate competition may only be concluded after the organization has conducted an appropriate procurement and only one company submits a responsible proposal.
- There is a public exigency or emergency. This means there is an urgency for the product or service which will not permit a delay incident to competitive solicitation. The idea is that there is an emergency, like a natural disaster, that precludes conducting procurement. Lack of planning in order to obligate

money before the end of the fiscal year does not qualify as an emergency under this provision.

We are attaching a pamphlet entitled, "CHILD NUTRITION PROGRAMS, PROCUREMENT TIPS". It may be reproduced and used as a training tool. If you have additional questions relating to Federal procurement requirements, please let us know.

Darlene Sanchez

DARLENE SANCHEZ, Chief
School Programs
Child Nutrition Programs

Attachments

CC: Colorado DPHE w/Attachments
Missouri DH w/Attachments
Montana DPHHS w/Attachments
Wyoming Health w/Attachments

include, but are not necessarily limited to information pertinent to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the cost or price.

14. Contract Provision

In addition to provisions defining a sound and complete procurement contract, any recipient of Federal grant funds shall include the following contract provisions or conditions in all procurement contracts and subcontracts as required by the provision, Federal law or the grantor agency.

a. Contracts other than small purchases shall contain provisions or conditions which will allow for administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate.

b. All contracts in excess of \$10,000 shall contain suitable provisions for termination by the grantee including the manner by which it will be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

c. All contracts awarded in excess of \$10,000 by grantees and their contractors or subgrantees shall contain a provision requiring compliance with Executive Order 11246, entitled "Equal Employment Opportunity," as amended by Executive Order 11375, and as supplemented in Department of Labor regulations (41 CFR Part 60).

d. All contracts and subgrants for construction or repair shall include a provision for compliance with the Copeland "Anti-Kickback" Act (18 USC 874) as supplemented in Department of Labor regulations (29 CFR, Part 3). This Act provides that each contractor or subgrantee shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The grantee shall report all suspected or reported violations to the grantor agency.

e. When required by the Federal grant program legislation, all construction contracts in excess of \$2,000 awarded by grantees and subgrantees shall include a provision for compliance

with the Davis-Bacon Act (40 USC 276a to a-7) as supplemented by Department of Labor regulations (29 CFR, Part 5). Under this Act contractors shall be required to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors shall be required to pay wages not less often than once a week. The grantee shall place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation and the award of a contract shall be conditioned upon the acceptance of the wage determination. The grantee shall report all suspected or reported violations to the grantor agency.

f. Where applicable, all contracts awarded by grantees and subgrantees in excess of \$2,000 for construction contracts and in excess of \$2,500 for other contracts which involve the employment of mechanics or laborers shall include a provision for compliance with Sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 USC 327-330) as supplemented by Department of Labor regulations (29 CFR, Part 5). Under Section 103 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of standard workday of 8 hours and a standard workweek of 40 hours. Work in excess of the standard workday or workweek is permissible provided that the worker is compensated at a rate of not less than 1-1/2 times the basic rate of pay for all hours worked in excess of 8 hours in any calendar day or 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous, or dangerous to his health and safety as determined under construction, safety and health standards promulgated by the Secretary of Labor. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

g. The contract shall include notice of grantor agency requirements and regulations pertaining to reporting and patent rights under any contract involving research, developmental, experimental or demonstration work with respect to any discovery or invention which arises or is developed in the course of or under such contract, and of grantor agency requirements and regulations pertaining to copyrights and rights in data.

h. All negotiated contracts (except those awarded by small purchase procedures) awarded by grantees shall include a

provision to the effect that the grantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract, for the purpose of making audit, examination, excerpts, and transcriptions.

Grantees shall require contractors to maintain all required records for three years after grantees make final payments and all other pending matters are closed.

i. Contracts, subcontracts, and subgrants of amounts in excess of \$100,000 shall contain a provision which requires compliance with all applicable standards, orders, or requirements issued under Section 306 of the Clean Air Act (42 USC 1857(h)), Section 508 of the Clean Water Act (33 USC 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR, Part 15), which prohibit the use under non-exempt Federal contracts, grants or loans of facilities included on the EPA List of Violating Facilities. The provision shall require reporting of violations to the grantor agency and to the USEPA Assistant Administrator for Enforcement (EN-329).

j. Contracts shall recognize mandatory standards and policies relating to energy efficiency which are contained in the State energy conservation plan issued in compliance with the Energy Policy and Conservation Act (P.L. 94-163).

Grantor agencies are permitted to require changes, remedies, changed conditions, access and record retention and suspension of work clauses approved by the Office of Federal Procurement Policy.

15. Contract Administration

Grantees shall maintain a contract administration system ensuring that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

Additional

Procurement Information:

United States Department of Agriculture
Uniform Federal Assistance
Regulations, 7 Code of Federal
Regulations,
Part 3015

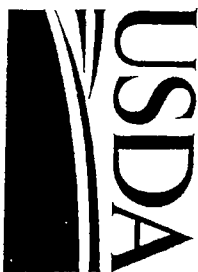
Office of Management and Budget
Circular A-102, Attachment O, issued
January 1981

Office of Management and Budget
Circular A-110, Attachment O, issued
July 30, 1976

The Federal Assistance Regulations and
Child Nutrition Program Regulations
issued by the United States Department
of Agriculture are available at the
following web site:

(<http://www.usda.gov/about.htm>)

Contact State administering agencies or
United States Department of
Agriculture, Food and Nutrition Service
Regional Offices for a copies of
Attachment O to Office of Management
and Budget Circulars A-102, dated
January 1981 and Circular A-110, dated
July 30, 1976.



U.S. Department of Agriculture
Food and Nutrition Service
Child Nutrition Division
3101 Park Center Drive
Alexandria, Virginia 22302

CHILD NUTRITION PROGRAMS PROCUREMENT TIPS

December 1999

*The Child Nutrition Programs supported by the U. S.
Department of Agriculture are equal opportunity programs.
If you believe you or anyone has been discriminated
against because of race, color, national origin, sex, age, or
disability, write immediately to: Administrator, Food and
Nutrition Service, at the above address*

PROCUREMENT METHODS

The expected cost of the planned purchase and the type of goods or services to be purchased are factors that must be considered when selecting a procurement method. The three commonly used procurement methods in the Child Nutrition Programs are:

Small Purchase:

- Informal
- Price or rate quotations from an adequate number of qualified suppliers

Competitive Sealed Bids (Formal Advertising):

- Invitation for bid
- Clear and complete specifications
- Advertised
- Sealed bids
- Public bid opening
- Unresponsive bids rejected
- Firm-fixed price contract awarded to lowest price responsible bidder

Competitive Negotiation:

- Request for Proposal
- Description of required goods/services
- Advertised
- Technical evaluation of proposals
- Negotiation with top offerors
- Price and other factors considered
- Fixed price or cost reimbursable contract awarded

PROCUREMENT DO'S

Contact State administering agency:

- State procurement requirements
- Technical assistance and guidance

Contact State purchasing offices:

- Purchasing under State contracts

Plan the procurement:

- Identify current and future needs
- Identify relevant specifications
- Identify the procurement method

Follow a code of conduct:

- Avoid conflicts of interest
- Write your own specifications, bid documents and contracts

Seek maximum open and free competition:

- Identify sources of supply
- Directly solicit and advertise bids
- Allow bidders sufficient time to reply

Award contracts to responsive and responsible bidders:

- Enforce contract terms and conditions
- Document nonperformance in writing

PROCUREMENT DON'TS

Unduly restrict competition:

- Unnecessary education or experience requirements
- Excessive bonding requirements
- Highly prescriptive specifications

Compromise procurement integrity:

- Bid documents, bid specifications and contract terms written by potential suppliers
- Gifts and compensation from potential contractors

Impulse buy:

- Purchase without planning
- Duplicative and unnecessary purchases

Undermine procurement process:

- Subdivide purchase to avoid formal bid thresholds
- Withhold necessary information from potential bidders
- Negotiate sealed bids procurements with potential contractors
- Evaluate unresponsive bids
- Allow contractors to make material changes to contract

Fail to enforce contract terms and conditions:

- Goods that do not meet specifications
- Unreasonable contractor delays
- Unauthorized substitutions
- Unauthorized price increases